Supreme Court, U.S.
FILED
JUN 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1374 (5)

In The

Supreme Court of the United States

October Term, 1988

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

THE BOARD OF EQUALIZATION OF CALIFORNIA,

Appellee.

On Appeal From The Court Of Appeal, State Of California Fourth Appellate District, Division One

BRIEF AMICUS CURIAE OF THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC. IN SUPPORT OF APPELLANT

DAVID M. LIBERMAN
Counsel of Record
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 277-9288

ROBERT C. MOEST
BARRY A. FISHER
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077
Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether, consistent with the Religious Clauses of the First Amendment, the State of California may impose a sales and/or use tax on the distribution of religious literature by a religious organization where: (1) the literature contains the fundamental teachings and beliefs of the religion; (2) the literature is distributed in furtherance of a basic tenet of the religion; (3) the literature is distributed for donations only; and (4) the funds received do not inure the benefit of any private individual, but are used exclusively for the organization's religious purpose.

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INTEREST OF THE AMICUS

This brief *amicus curiae* in support of the appellant is presented from the perspective of a minority religious movement, the International Society for Krishna Consciousness of California, Inc. (ISKCON), a not-for-profit religious corporation in Los Angeles, California. The brief is filed with the consent of the parties, as provided for by the Rules of Court.

ISKCON adheres to the principles of *Guadiya Vaishnavism*, or Krishna consciousness, which as a central tenet of its theology requires its followers to "[i]nstruct everyone to follow the orders of Lord Krishna as they are given in the *Bhagavad-gita* and *Srimad Bhagavatam* . . . and in this way try to liberate everyone in this land." A. Bhaktivedanta, *Sri Caitanya Caritamrta: The Pastimes of Lord Caitanya Mahaprabhu*, 3 Madhya-Lila 7:128 (1975).[1] In furtherance of this sacred command, Krishna devotees are "spiritually motivated to perform a religious ritual

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[1] The goal of the Hare Krishna movement may be said to be two-fold: First, one is to surrender himself completely to Krishna, who is recognized as the highest personality of Godhead. Through this devotion he will develop Krishna consciousness, which entails the deepening of one's love of God and man. . . . Secondly, one should endeavor to spread this knowledge of Krishna consciousness to all who are willing to learn it. Thus the Hare Krishna devotee lives an entirely sacralized life, in which all his waking hours are directed to no other purpose than to serve Krishna in these ways.

Judah, *The Hare Krishna Movement*, in Religious Movements in Contemporary America 465 (I. Zaretsky and M. Leone eds. 1974).

known as 'Sankirtan.' That ritual consists of the dissemination of religious tracts and small gifts to the public and the solicitation of funds to support the religion." *Jaffe v. Alexis*, 659 F.2d 1018, 1020 (9th Cir. 1981). *Sankirtan* "has three purposes: (1) to spread religious information which the Hare Krishna religion deems to be the truth; (2) to proselytize and attract new members; and (3) to generate funds to support the religious activities of the movement." *United States v. Silberman*, 464 F. Supp. 866, 870 (M.D. Fla. 1979).[2]

Because the performance of *sankirtan* "lies at the theological heart of [ISKCON's] religion" *Int'l Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 443 (2d Cir. 1981), Krishna entities throughout the United States have consistently resisted governmental efforts to prohibit or impede their efforts to proselytize in a variety of public places, including airports,[3] state fairs,[4]

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[2] *See also Int'l Soc'y for Krishna Consciousness v. Wolke*, 453 F. Supp. 869, 871 (E.D. Wis. 1978); *Int'l Soc'y for Krishna Consciousness v. Engelhardt*, 425 F. Supp. 176, 178 (W.D. Mo. 1977); *Int'l Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666, 669 (W.D. Pa. 1977).

[3] *E.g., Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Int'l Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Int'l Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49 (E.D. Lou. 1978); *Int'l Soc'y for Krishna Consciousness v. New York Port Authority*, 425 F. Supp. 681 (S.D. N.Y. 1977); *Int'l Soc'y for Krishna Consciousness v. Wolke, supra; Int'l Soc'y for Krishna Consciousness v. Griffin, supra; Int'l Soc'y for Krishna Consciousness v. Engelhardt, supra; Int'l Soc'y for Krishna Consciousness v. Collins*, 452 F. Supp. 1007 (S.D. Texas 1977).

[4] *E.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *Hynes v. Metro Gov't of Nashville and Davidson*

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stadia,[5] public buildings,[6] highway rest areas,[7] and public parks and sidewalks.[8] More than all of these challenges, however, is the threat posed to the free exercise of *amicus'* religion by application of the California sales and use tax to the distribution of religious literature.

Amicus does not sell its literature for a fixed price; nor is there a direct relationship between the cost to *amicus* of the book given and the donation received. Rather, a religious book is offered during *sankirtan* and any donation that is received is only incidental to the

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County, 667 F.2d 549 (6th Cir. 1982); *Int'l Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430 (2d Cir. 1981); *Edwards v. Maryland State Fair and Agricultural Soc'y, Inc.*, 628 F.2d 282 (4th Cir. 1980); *Int'l Soc'y for Krishna Consciousness v. Bowen*, 600 F.2d 667 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979); *Int'l Soc'y for Krishna Consciousness v. State Fair of Texas*, 480 F. Supp. 67 (1979); *Int'l Soc'y for Krishna Consciousness v. Evans*, 440 F. Supp. 414 (S.D. Ohio 1977).

[5] *E.g., Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985); *Int'l Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982).

[6] *E.g., United States v. Silberman*, 464 F. Supp. 866 (M.D. Fla. 1979); *United States v. Boeswetter*, 463 F. Supp. 370 (D.C.D.C. 1978); *Int'l Soc'y for Krishna Consciousness v. McAvey*, 450 F. Supp. 1265 (S.D.N.Y. 1978); *Int'l Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. 714 (N.D. Texas 1978).

[7] *Int'l Soc'y for Krishna Consciousness v. Hays*, 438 F. Supp. 1077 (S.D. Fla. 1977).

[8] *Int'l Soc'y for Krishna Consciousness v. Schmidt*, 523 F. Supp. 1303 (D.My. 1981); *Int'l Soc'y for Krishna Consciousness v. Kearnes*, 454 F. Supp. 116 (E.D. Cal. 1978); *Int'l Soc'y for Krishna Consciousness v. City of New York*, 484 F. Supp. 966 (S.D.N.Y. 1979); *Int'l Soc'y for Krishna Consciousness v. Conlisk*, 374 F. Supp. 1010 (N.D. Ill. 1973); *Int'l Soc'y for Krishna Consciousness v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

book. Thus, one critic has observed that the aim of *sankirtan*

> is not primarily to make money (though devotees are very aware of the need to do so in order to cover the ever-increasing temple overheads), but to make the public aware of Krishna Consciousness and to 'plant Krishna in their hearts.' Even if people who buy Krishna Consciousness literature do not read it, devotees maintain that merely by association with Prabhupada's books and their Krishna content, they will be purified.

A. Burr, *I Am Not My Body: A Study of the International Hare Krishna Sect* 94 (1984).

Nonetheless, the California Board of Equalization has assessed ISKCON almost $300,000 in sales and use taxes for the period 1973-79.[9] The tax, which *amicus* paid under protest in 1980, was divided into two parts: (1) a *use* tax on religious books purchased from an out-of-state printer, which were then distributed gratuitously by *amicus* directly to the public; and (2) a *sales* tax on the transfer of religious books for a fixed sum by *amicus* to other Krishna consciousness temples within California, which in turn distributed the books gratuitously to the public.

Following payment of the tax, ISKCON filed an action for refund in Los Angeles County Superior Court, arguing that the law, as applied to the noncommercial distribution of religious literature, violated both the Free Exercise and Establishment Clause provisions of the United States and California Constitutions. After a trial

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[9] ISKCON was also assessed $43,922.98 in tax, interest and penalties for the last eight months of 1980. (Notice of Redetermination, No. SR AS 18-649831 Jan. 28, 1988). As discussed below, these substantial taxes have severely impaired the core religious practice of *sankirtan*.

on stipulated facts, the trial court denied *amicus'* claim for refund. *Int'l Soc'y for Krishna Consciousness v. Bd. of Equalization of the State of California,* No. C360177 (L.A., Cal. Super. Ct. Jan. 7, 1987). Accordingly, an appeal was taken to the Court of Appeal, *Int'l Soc'y for Krishna Consciousness v. Bd. of Equalization of the State of California,* No. B026332 (Cal. Ct. App., 2d Dist.), which has postponed its decision pending resolution of the present case.

For these reasons, ISKCON has a critical interest in the outcome of this case. If the California sales and use tax may be applied to the noncommercial distribution of religious literature, the principal means of proselytization for numerous religious organizations will be severely burdened. For fledgling religions such as Krishna consciousness, the tax may very well mean the difference between survival or failure.

SUMMARY OF ARGUMENT

The Free Exercise Clause of the First Amendment requires that the distribution of religious literature to the public be free of taxes, including the sales and use taxes imposed by California. The dissemination of scripture is speech, but the protection to be afforded it must be greater than that given other forms of speech because frequently it is *more* than speech. Many believers find in scripture power beyond its words, and in disseminating it, are worshipping God. Religion is given explicit protection in the First Amendment, beyond that given to speech generally. The Court has never approved a direct tax on the very act of religious worship, and has specifically stated that such taxes would violate the Free Exercise Clause. That the form of religious worship resembles

something protected by another constitutional provision should not diminish the protection afforded it by the Free Exercise Clause. Taxing religious literature, as does California, directly reduces the number of books that may be distributed, particularly when no fixed price is charged for the material. If a six percent sales tax is imposed, at least six percent less literature can be distributed because those relying on donations cannot increase the price by six percent. If the funds raised by public place proselytizing are the principal means of support of the religion, however, the impact will be far greater, because the funds raised must first pay fixed costs other than the purchase of books and pamphlets. If ten percent of a church's budget were available for the purchase of literature, a six-percent sales tax would reduce the amount of literature that could be distributed by more than half.

Typically, it is "new" or minority religions, such as ISKCON, that engage in widespread public dissemination of literature to spread the news of their existence and their message. Longer established churches rely on their larger number of members to attract new followers, or upon the religion of parents being followed by children. Typically, too, more familiar denominations have a broad base of financial support that makes it unnecessary for them to raise money from the general public. Therefore, the tax on the distribution of religious literature especially burdens fledgling, less familiar creeds, and brings the taxing power of the state to bear on behalf of existing churches.

To withstand a challenge under the Free Exercise Clause, a law must serve a compelling governmental interest. California did not and could not show that the loss of the minuscule fraction of its revenue derived from

taxing religious literature would have any discernable impact on its budget. Instead, it asserts that the Establishment Clause would be violated by exempting religion from a facially neutral sales and use tax law.

Tax simplification notwithstanding, exemption of a variety of individuals, enterprises, investments, and institutions from taxes at every level has long been and remains a feature of tax policy. When the exemption follows from the Free Exercise Clause, it not only serves a secular purpose, but one of the highest order. Precisely because religious exercise has explicit constitutional recognition, exceptions from facially neutral laws exist for unemployment insurance, compulsory school attendance, and labor-management relations. Not only does this special treatment of religion not offend the Establishment Clause, but it has been found, in many instances, to be required by the Free Exercise Clause.

While a tax exemption will, no doubt, aid religion indirectly, it does not involve the direct transfer of public funds to the church treasury. With the exception of the plurality opinion in *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 80 (1989), the Court has drawn a sharp distinction between laws that relieve religions of certain burdens and those that give religion direct support. A majority of the *Texas Monthly* court would not, however, find that a properly drafted exemption that included religious literature offended the Establishment Clause. At the very least, the imposition of taxes on religious worship raises the specter of substantial entanglement between state and church, an Establishment Clause violation of greater magnitude than that created by an exemption.

ARGUMENT

I.

AN EXEMPTION FROM THE CALIFORNIA SALES AND USE TAX FOR THE NONCOMMERCIAL DISTRIBUTION OF RELIGIOUS LITERATURE IS REQUIRED UNDER THE FREE EXERCISE CLAUSE.

A. The Free Exercise Clause Advances Core Constitutional Values Independent Of Those Protected By The Free Speech And Free Press Clauses Of The First Amendment.

For over 45 years, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), *Jones v. City of Opelika*, 316 U.S. 584 (1942), *majority opinion vacated and dissenting opinions adopted per curiam*, 319 U.S. 103 (1943), and *Follett v. Town of McCormick*, 321 U.S. 573 (1944), have helped to define religious liberty in the United States. In holding a flat license tax on the distribution of religious literature unconstitutional, *Murdock*, *Jones* and *Follett* are an essential component in a series of decisions by this Court upholding the rights of religious organizations to proselytize.[10] Writing for four dissenting justices in *Jones*, Justice Murphy was moved to observe the "arresting parallel . . . between the troubles of Jehovah's Witnesses and the struggles of various dissentient groups in the American Colonies for religious liberty which culminated in the Virginia Statute

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[10] *E.g.*, *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Tucker v. Texas*, 326 U.S. 517 (1946); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Jamison v. Texas*, 318 U.S. 413 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

for Religious Freedom, the Northwest Ordinance of 1787, and the First Amendment." 316 U.S. at 622.

Yet, "despite [this] most telling of personal experiences in religious persecution suffered by our forebears," *Abington School Dist. v. Schemmp*, 374 U.S. 203, 214, (1963), the instant case threatens to unravel that which has taken generations to create. In one of its most celebrated passages, *Murdock* emphasized that "the hand distribution of religious tracts . . . is more than preaching" or the "distribution of literature." 319 U.S. at 108-09. Rather, "[i]t is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." *Id.* at 109. Justice Murphy also stressed in *Jones* that "[i]mportant as free speech and free press are to a free government and a free citizenry, there is a right even more dear to many individuals – the right to worship their Maker according their needs and the dictates of their souls and to carry their message or their gospel to every living creature." 316 U.S. at 621 (Murphy, J., dissenting).

These decisions express a deep-rooted devotion to the principles of religious liberty and expression. Yet, the plurality opinion in *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 80 (1989), should it become the view of a majority of the Court, would effectively undermine this commitment by paring back those precedents. *Murdock* and *Follett* are not "unnecessarily sweeping" 109 S. Ct. at 903, when they suggest that "the States and the Federal Government may never tax the sale of religious . . . publications." *Id.* at 904. Nor does granting a tax exemption for religious expression violate the Establishment Clause. *Id.* at 899-900.

Murdock, Follett and *Jones* properly recognize that "religious liberty is one of the most fundamental and important values in American life." Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee,* 80 Har. L. Rev. 1381, 1385 (1967). Indeed,

> religious liberty is the central concern of the constitutional order as it relates to the subject of religion. The purpose of the constitutional system – both in the restriction it imposes on the power of the government to interfere with the free exercise of religion and the limitation on the power of government to establish, aid, and support religion – is to protect and promote religious liberty in the widest sense of the term, including the individual's freedom to believe and to express his belief and the liberty of religious communities to bear witness to the truth they confess.

P. Kauper, *Religion and the Constitution* 13 (1964) [hereinafter Kauper].

Religious liberty, therefore, including that of religious expression, must be "recognized as an independent substantive liberty, having its own purpose, content, and dimension and existing apart from the other commonly recognized guarantees of free speech, free press, and freedom of assembly." *Id.* at 15. As further explained by Professor Kauper

> Religion deals with man's relationship with his God, however he may be defined. It is a highly personal matter and involves a man's loyalty to God as his highest good and the duties arising from this relationship. It defines an area of spiritual autonomy which is withdrawn from the reach of civil authority. It involves belief, and it conditions conscience and feeling. It presupposes freedom and voluntary adherence and cannot be coerced. Classical Christian thinking supports this view. Christian theologians recognize, first at all, a basic interior freedom of the

> Christian that can be described only in spiritual terms and which by its nature is incapable of limitation or circumscription by the state.

Id. at 22 (footnote omitted).

Because the spiritual commitment of many religious organizations, including that of *amicus*, "requires witnessing to the faith, the free expression of this faith in word and deed is essential." *Id.* at 22-23. This freedom, moreover, must include the unfettered right to seek converts through proselytization, to solicit for religious purposes, and to publish and distribute religious books and material. *Id.* at 34-35.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), therefore, the Court explicitly recognized the special status of claims arising under the Free Exercise Clause by pointing out that

> if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, *their claims would not rest on a religious basis*. Thoreau's choice was philosophical and personal rather than religious, and *such belief does not rise to the demands of the Religion Clauses*.

Id. at 216 (emphasis added).

The value of religious liberty is also embodied in the history of tax exemptions for religious institutions.[11] In

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[11] The granting of tax exemptions to religious organizations is probably as old as the institution of taxation. *See* Adler, *Historical Origin of the Exemption from Taxation of Charitable Institutions*. The exemption from taxation of churches, for example, "is based on a European tradition going back to the fourth century when the Emperor Constantine the Great, after

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the colonial period, for example, the rationale underlying the universal practice of exempting church property from taxation rested squarely on the concept of religious liberty:

> [I]f churches were to operate in a free market environment, a prerequisite was that churches have independence from governmental control, not just independence from governmental support. If churches were to draw upon their own resources and pursue their calling as they understood it, the government should not unduly impede those efforts. To have voluntaristic churches meant to be free of both government help and hindrance.

Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 360 (1984).[12]

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his conversion, gave the Church this privilege." A. Stokes and L. Pfeffer, *Church and State in the United States* 546 (1964). The exemption, moreover, was supported by the doctrine that church property "ceased to be under human control when it was devoted to God." Stimson, *The Exemption of Property from Taxation in the United States*, 18 Minn. L. Rev. 411, 416 (1934). This same rationale is equally applicable to religious literature.

Moreover, while a tax exemption of "long standing" may not "shield [it] from the strictures of the Establishment Clause," *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 901 n.8 (1989) (plurality opinion), "[d]evotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people." *McCollum v. Bd. of Education*, 333 U.S. 203, 256 (1948) (Reed. J., dissenting).

[12] This concept has both Free Exercise and Establishment Clause implications, and represents a *quid pro quo* between them in the area of tax exemptions for religion. Thus, "if the state is not to support the church, neither is the church to support the state." E. Smith, *Religious Liberty in the United*

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In light of these compelling underpinnings, this Court has consistently "interpreted the free exercise clause to provide a virtually unique protection for religion, one that is markedly greater than the security that the Constitution provides for speech." Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 Wm. & Mary L. Rev. 943 (1986) [hereinafter Choper]. An exemption from the California sales and use tax for the noncommercial distribution of religious literature is thus required unless the California State Board of Equalization (Board) demonstrates, at a minimum, that taxing this form of religious expression is the "least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). "It is basic that no showing merely of a rational relationship to a colorable state interest would suffice." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Rather, "only those interests of the highest order and not those otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

For the reasons discussed below, the California tax fails to satisfy this stringent standard.

B. Application Of The California Sales And Use Tax To The Dissemination Of Religious Books Creates A Direct and Substantial Burden On The Free and Voluntary Exercise Of Religion.

The formidable power of tax laws and policies to shape and inform the exercise of religious life is well documented. Federal tax laws, for example,

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States 295 (1972); *see* Freund, *Public Aid to Parochial Schools*, 82 Har. L. Rev. 1680, 1687 n. 16 (1969); *Walz v. Tax Comm'n*, 397 U.S. 664, 693 (1970) (Brennan, J., concurring).

> induce new religious movements to become formally organized at a very early date and thus may make them visible sooner than is true of similar groups in Europe. As a result, the primary regulators of our religious economy are state and federal tax collectors. This situation is reflected in the fact that founders and leaders appear to be the single highest risk group in terms of prosecution for tax violations. Unwittingly perhaps the IRS serves as a functional equivalent of the Holy Inquisition in the officially unregulated religious economy of the United States.

Stark, *How New Religions Succeed: A Theoretical Model*, in The Future of New Religious Movements 19 (D. Bromley and P. Hammond eds. 1987) [hereinafter *How New Religions Succeed*].

This power, moreover, is particularly delicate when applied to religion. "Because religious organizations need money (as well as donated time and services) for their activities, the scope of those activities will be influenced by governmental actions that have the effect of either taxing or subsidizing religion generally or particular religious organizations." McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 5 (1989) [hereinafter McConnell & Posner].

Thus, when the Jehovah's Witnesses pressed their right to proselytize and distribute religious literature principally in the 1930s and 1940s, it was not without reason that Chief Justice Stone stated in his dissenting opinion to *Jones* that "if the State may tax the privilege [of distributing religious literature] it may fix the rate of tax and, through the tax, control or suppress the activity which it taxes." 316 U.S. at 607. Nor was the Court in *Murdock* overreaching when it emphasized that "this method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute

which is exacted town by town, village by village." 319 U.S. at 115.

The Court's historic concern that some religious movements might collapse under the weight of government taxation rather than on the basis of the "zeal of [their] adherents, and the appeal of [their] dogma" *Zorach v. Clausen*, 348 U.S. 306, 313 (1952) is thus more than a "figure of speech." *McCollum v. Bd. of Education*, 333 U.S. 203, 247 (1948). To the contrary, this danger was so apparent to the majority in *Murdock* that it "did not believe it necessary to demonstrate that a tax actually had functioned repressively; it was sufficient to show that a First Amendment right was in fact being taxed in order to strike down the law." E. Smith, *Religious Liberty in the United States* 290 (1972).

This recognition is no less relevant today than it was 45, or, for that matter, 200 years ago. As noted above, Krishna consciousness requires its followers to perform *sankirtan*, in the context of which religious books are distributed and funds are received. However, there is no *quid pro quo* between the books distributed and the money received. Rather, such funds represent a voluntary donation by the contributor which can, and is, used for a variety of religious purposes, including support of the religion. Because of the voluntary manner in which *sankirtan* is performed, it is not possible to increase the amount of the donation, although an additional 6.5% "cost" is imposed by the California tax. The result of the tax is thus a significant decrease in the number of books distributed, as well as a painful reduction in the funds available to support the religion. Consequently, ISKCON is faced with two responses to imposition of the tax: (1) continue to perform *sankirtan* in the traditional manner;

or (2) radically alter the manner in which *sankirtan* is performed by "selling" religious literature for a fixed price.

Both of these alternatives are untenable. On the one hand, if ISKCON continues to perform *sankirtan* in a voluntary manner, it may not generate sufficient donations to pay the tax, not to speak of covering the cost of printing books or maintaining its temple and religious programs. On the other hand, if *Iskcon* "sells" its books for fixed price in order to ensure that it will generate enough funds to pay the tax, it will be radically modifying a sacred practice under governmental coercion.[13]

Moreover, in creating a direct and substantial burden on religious organizations that rely upon the grassroots distribution of religious literature for their survival, the tax simultaneously jeopardizes the core constitutional value of "pluralism of thought, a tonic necessary for a healthy, diverse society." *Barber*, 650 F.2d at 438; *see Walz*, 397 U.S. at (1970) (Brennan, J., concurring); *Schemmp*, 374 U.S. at 305 (1963) (Goldberg, J., concurring). Socio-culturally, it has been observed that minority religious movements such as ISKCON are more likely to succeed to

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[13] "[I]f a state seeks to impose property taxation on the property of a church, it follows that the state is claiming sovereignty over the church as an institution. This claim of sovereignty over the church has been rejected by Christianity for the last two thousand years" Comment, *Would Caesar Tax God? The Constitutionality of Governmental Taxation of Churches*, 35 Drake L. Rev. 383, 392 (1985-86), and is firmly embodied in the concept of religious liberty. Consequently, "[s]ince 'the power to tax involves the power to destroy,' a claim by the government that it has inherent authority to levy a tax on the church is tantamount to a claim by the government that it has the latent power to destroy the church." *Id.* at 392.

the extent that they occur within a *"favorable ecology"* which is *"relatively unregulated."* *How New Religions Succeed, supra,* at 13 (emphasis in original). In this respect, religious competition is comparable to

> a market and the set of firms seeking to serve that market. And, as with commercial economies, a major consideration is the degree to which the market is regulated – that is, the extent to which it is a free market ruled by the forces of the marketplace, *or a market distorted toward monopoly by use of coercion by the state.* . . . [T]o the degree a religious economy is unregulated, pluralism will thrive – that the 'natural' state of religious economies is one in which a variety of firms successfully cater to the special religious interests of limited market segments.

Stark, *Church and Sect,* in The Sacred in a Secular Age 143 (P. Hammond ed. 1985) (emphasis added).

The First Amendment, therefore, can best "be understood as positing that the 'market' – the realm of private choice – will reach the 'best' results; or more accurately, that the government has no authority to alter such results." McConnell & Posner, *supra,* at 14. *Amicus* submits, however, that the California sales and use tax interferes with the delicate balance of religious pluralism by making it excessively costly for certain religious organizations to carry out their fundamental religious mission. Specifically, the tax impacts most severely on those religious organizations that rely upon the distribution of literature as their principal means of worship and proselytization, as well as upon new or minority religions that lack the financial resources[14] that mainstream, established religions may possess to absorb the cost of the tax.

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[14] *See* Johnson, *A Sociologist of Religion Looks at the Future of New Religious Movements,* in The Future of New Religions 258 (D. Bromley and P. Hammond eds. 1987).

The Free Exercise Clause, however, was meant to have the opposite effect.

> By taking into account the special costs that practitioners of minority faiths incur (minority faiths because laws generally reflect majority preferences – *e.g.*, for which day businesses shall be required to close), [the Free Exercise] cases reduce the cost of practicing such faiths and by doing so tend to increase the variety of faiths, which in turn enables more people to find a set of religious practices and beliefs they can share.

Id. at 55 (footnote omitted).

Thus, "if the state, through pecuniary or non-pecuniary exactions, makes it more costly to adhere to one creed than another (including the creed of nonbelief), this may cause a shift in religious affiliation." *Id.* at 5.

For this reason, church property, including religious literature,

> must remain tax free. To lay a tax on churches would enhance the power of the State; it would enable the State to control the churches and would certainly be contrary to the basic principle of church-state separation. The State that has ever-increasing need of financial resources might jeopardize the church's ability to operate as an effective agency. *Moreover, church taxation would enable only wealthy churches to subsist.*

Walther, *Tax Exemption and the Church*, 57 Liberty 10, 13 (1962) (emphasis added).[15]

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[15] "The disparity in income between large churches and small ones should not be forgotten here. A tax on large religious institutions would not be as detrimental to them as it would be to a small institution. If you take food away from a rich man and a poor man, the rich man will only be hungry, but the poor man may die." Hageman, *An Examination of Religious Tax Exemption Policy Under Section 501(c)(3) Internal Revenue Code*, 17 Val. U.L. Rev. 405, 433 (1983).

Thus, in addition to placing a direct and substantial burden on religious expression, the California sales and use tax effectively reduces the variety of religious options available "in the competition of the [free] market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes J., dissenting).

C. The California State Board Of Equalization Has Failed To Articulate, Much Less Support, A Compelling Reason Sufficient To Override The Form Of Free Exercise Of Religion At Issue Here.

Aside from the basic offensiveness of a tax levied directly upon religious expression, other powerful reasons exist for holding the California sales and use tax an unconstitutional burden on the noncommercial distribution of religious literature. On the affirmative side, "the United States 'has long recognized the need to encourage, not handicap, those instrumentalities which foster and inculcate the principles of mercy, religion, and charity,' and which through their ethical teachings are a great asset 'in the field of public order.' " A. Stokes and L. Pfeffer, *Church and State in the United States* 547-48 (1964) (footnote omitted). Indeed, "[t]he influence of churches upon the character of various members of society is said to be sufficiently desirable to warrant the removal of church property from the tax roll. Religious societies devote their efforts and their property to the moral uplifting of society, in most cases seeking no pecuniary profit for themselves." Stimson, *The Exemption of Property from Taxation in the United States*, 18 Minn. L. Rev. 411, 422 (1934). This rationale, moreover, has not been limited to real estate owned by churches, but extends equally to the income of religious organizations, *see, e.g.*, H.R. Rep. No.

1860, 75th Cong., 3d Sess. 19 (1939), as well as to sacred literature. *See* Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in The Wall Between Church and State 111-12 (D. Oaks ed. 1963).

Under these circumstances, few, if any, state interests are sufficiently compelling to justify the substantial infringement of religious liberty created by the California tax. Generally, the free exercise of religion may be restricted "only to prevent grave and immediate danger to interests which the state may lawfully protect." *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 629 (1943). Indeed, "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert*, 374 U.S. at 403; *accord Yoder*, 406 U.S. at 220.[16]

When such paramount interests are not at stake, however, the Court has required that religiously grounded exemptions be granted to otherwise neutral laws of general application. Thus, in *Sherbert* the Court

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[16] In this regard, overriding governmental interests have been found to exist in circumstances involving prohibitions against polygamy, *Reynolds v. United States*, 98 U.S. 145 (1878), and child labor, *Prince v. Massachusetts*, 321 U.S. 158 (1944); in the government's need for mandatory vaccinations against communicable diseases, *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905); in a uniform day of rest, *e.g., Braunfeld v. Brown*, 366 U.S. 599 (1961); in the elimination of racial discrimination in education, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); and in the military's need for discipline and uniformity. *Goldman v. Weinberger*, 475 U.S. 503 (1986). The Court has also recognized important interests in the government's control of its internal administrative procedures, *Bowen v. Roy*, 476 U.S. 693 (1986) (opinion of three justices) and of its resources. *Lyng v. Northwest Cemetery Ass'n*, 108 S. Ct. 1319 (1988).

held the State's interest in preventing fraudulent unemployment claims insufficient to override a Seventh-day Adventist stricture prohibiting work on Saturday. Similarly, in *Yoder* the Court found the State's interest in compulsory universal education, "however highly we rank it" 406 U.S. at 214, insufficient to abridge a conviction of the Old Order Amish prohibiting public high school education for its young people. The Free Exercise Clause, therefore, "not only permits states to give exemptions to aid religion, but sometimes, as the Court's decisions in *Yoder* and *Sherbert* demonstrate, the rule requires states to give such exemptions." Choper, *supra*, at 947. Such is certainly the case with respect to a state *excise tax* imposed directly on religious literature.

This conclusion, moreover, is not undermined by *United States v. Lee*, 455 U.S. 252 (1982), which concerned the question of whether "imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance funds." *Id.* at 254. In upholding the constitutionality of the tax, the Court found compelling a governmental interest in the integrity of the "nationwide" social security system, *id.* at 258, which "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants." *Id.* In other words, the interest in *Lee* was not the integrity of the tax system *per se*, but rather the threat to a system designed to aid the participants in one of the most vulnerable phases of their lives – old age.[17]

Here, in contrast, no such compelling interest exists. The tax in *Lee* was imposed on and for the benefit of

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[17] *See* McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 54 (1989).

individuals. The California tax, however, is imposed directly on the very act of religious worship. Also, the California tax is a state, as opposed to national, revenue raising device which lacks a specific overriding public welfare objective such as ameliorating the financial hardships of old age.

Moreover, the Board has not shown that the revenues generated by imposing a direct tax on the dissemination of religious literature is essential to its fiscal viability. In *Yoder*, for example, the State contended that its interest in its system of compulsory education was so compelling that even the established religious practices of the Amish had to give way. 406 U.S. at 221. The Court, however, refused to accept this unsupported assertion, and instead placed the burden of proof of the existence of such an interest squarely on the State:

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Id.

Similarly, in *Sherbert* the Court emphasized that there was "no *proof* whatever to warrant [the State's] fears of malingering or deceit as those which the respondents now advance." 374 U.S. at 407 (emphasis added).[18] The

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[18] *See also Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting) ("government must show that the opposing interest it asserts is of especial importance . . . [and] that the interest asserted will *in fact* be substantially harmed." [emphasis added]).

Court, therefore, may not simply accept without question the Board's theoretical assertion that it has a compelling interest in its excise tax system. Rather, assuming that the Board may impose a direct tax on religious literature – a proposition which *amicus* vigorously contests – the Board must be required to show, at a minimum, that the revenues generated by the tax are *critical* to its fiscal viability, which it has utterly failed to do.

D. The Board Has Also Failed To Demonstrate That Taxing The Dissemination Of Religious Literature Is The Least Restrictive Means Of Achieving Any Compelling Interest Found To Exist.

Along the same lines, the Board must also be required to show that the minimal diminution in revenues which would be created by exempting religious literatures from the tax could not be recovered from other sources. For example, the federal government imposes a tax, with certain exceptions, on charitable and religious organizations which derive income from "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function." 26 U.S.C.A. § 512(a) (West 1988). *Amicus* suggests that this is the proper standard for taxing religious organizations, as "a line between non-profit and the commercial activities of churches treats churches more neutrally than would other lines (for example, religious-nonreligious)." McConnell & Posner, *supra*, at 13.

However, the California tax makes no such distinction. On the contrary, the tax is callously imposed directly on an activity which *amicus* and many other religious organizations regard as sacred. Consequently, the distribution of religious literature is "not [a] proper source[ ]

of taxation for general revenue purposes. . . ." *Jones*, 316 U.S. at 620 (Murphy, J., dissenting). "[T]he State's interest [in] obtaining revenue, which [can] be satisfied by taxing any of a variety of sources, [does] not justify a levy imposed upon an activity which in the light of history could reasonably be viewed as Sacramental." *McGowan v. Maryland*, 366 U.S. 420, 462-63 (1961) (separate opinion of Frankfurter, J., joined by Harland, J.). Rather, "the State's interest [in] obtaining revenue [must] be . . . satisfied by imposing this tax on nonreligious sources" *Braunfeld v. Brown*, 366 U.S. 599, 607 n.4 (1961), which will avoid the effect of "chok[ing] off ideas." *Jones*, 316 U.S. at 620 (Murphy, J., dissenting).

II.

AN EXEMPTION FROM STATE SALES AND USE TAXES REQUIRED BY THE FREE EXERCISE CLAUSE WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE.

As *amicus* argues above, the day "for defining the ultimate scope of *Follett* and *Murdock*," *Texas Monthly*, 109 S. Ct. at 907 (Blackmun, J., concurring in the judgment), is at hand. For the reasons already given, the Free Exercise Clause requires that religious groups that distribute religious literature for donations as an act of religious worship, be granted an exemption from state sales and use taxes. For the reasons discussed below, such an exemption would not offend the Establishment Clause, especially if it were stated broadly enough to encompass ultimate beliefs of the kind found to be sufficiently like religion to qualify an individual for classification as a conscientious objector to military service, *see Welsh v. United States*, 398 U.S. 333, 344 (1970); *United States v.*

Seeger, 380 U.S. 163, 166 (1965), or of the kind used to interpret religious exemptions from property taxes. *See Washington Ethical Soc'y v. Dist. of Columbia*, 249 F.2d 127 (D.C. Cir. 1957).

Until *Texas Monthly*, the Court had not struck down an exemption of churches or religious activities from taxation; nor had it approved a tax on such activities. On the contrary, the Court's principal pronouncements either invalidated taxes, as in *Murdock* and *Follett*,[19] or upheld tax exemptions, such as in *Walz*. If there was no formal agreement between church and state that churches would not look to government for financial support and government would, in turn, not seek financial support from churches, the virtually unbroken history of exempting churches from taxation bespeaks such an understanding.

Thus, the distinction between an exemption and a subsidy had long been clearly understood. Even if, according to some economic theories, they are functionally equivalent, the wisdom of the Bill of Rights makes clear that

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . .There is no genuine

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[19] *United States v. Lee*, 455 U.S. 252 (1982), a case discussed above, did not involve taxation of a religious institution, but rather merely the taxation of individuals. Moreover, the tax was imposed not on religious worship, but on employment unrelated to religious command. Similarly, in *Hernandez v. Commissioner*, 57 U.S.L.W. 4593 (U.S. June 5, 1989), the Court upheld an IRS disallowance of certain individual deductions from income, an action that did not tax a religious institution directly nor impose any tax on an act of worship.

nexus between tax exemption and establishment of religion.

Walz, 397 U.S. at 675. Indeed, the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity,' " *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), were first spelled out in those precise terms in *Walz*, which upheld an exemption of church property from taxes.

In *Texas Monthly*, the Court confronted extraordinarily difficult issues about the application of the Religion Clauses without the benefit of any religious group or individual as a party. The plurality first focused on the relatively narrow nature of the Texas tax exemption – its precise scope was not known, *see* 109 S. Ct. at 907 (Blackmun, J., concurring in the judgment) – to distinguish it from the property tax exemption approved in *Walz*.

Such breadth has not, in other contexts, served to insulate the transfer of funds to religious institutions from the strictures of the Establishment Clause. Both the Rhode Island Salary Supplement Act and the Pennsylvania Nonpublic Elementary and Secondary Education Act, for example, aided all "nonpublic schools," religious and non-religious alike. *Lemon*, 403 U.S. at 607, 609. In any event, the majority in *Walz* specifically disclaimed any reliance on the breadth of the exemption. "We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others." 397 U.S. at 674.

Conversely, that the Free Exercise Clause frequently requires that some religions be granted exemptions from facially neutral laws has not led to the preference of the values inherent in the Establishment Clause over those

embodied in Free Exercise. On the contrary, it is the Free Exercise Clause that generally dominates, and such "dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment." L. Tribe, *American Constitutional Law* 1201 (2d ed. 1988). A majority of *Texas Monthly* could not approve "subordinating the Free Exercise value," especially "at the expense of longstanding precedents." 109 S. Ct. at 906 (Blackmun, J., concurring in the judgment); *see id.* at 912 (Scalia, J., dissenting).

If a narrow exception necessarily violated the Establishment Clause, it would be difficult to explain such decisions as *Sherbert*, *Thomas v. Review Bd.*, and *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987), all of which gave special treatment to individuals whose religious beliefs precluded their performing work on Saturdays. Similarly, the Old Order Amish were treated with favoritism when their children were excused from compulsory school attendance in *Yoder*.

In weighing the impact of the Establishment Clause on a governmental action, the three factors articulated in *Lemon* are usually considered.

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, that statute must not foster 'an excessive government entanglement with religion.'

403 U.S. at 612-13 (citations omitted).

While the *Lemon* test is most clearly suited for use in evaluating legislative enactments, the constitutional concerns it embodies are relevent to the implications of

granting an exemption to sales and use taxes. Should the Court hold that the Free Exercise Clause mandates an exception to state sales and use taxes at least in certain circumstances, its reliance on the constitutional provision would unquestionably satisfy the "secular purpose" requirement. If actions *"arguably* compelled," *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) (emphasis added), by the Free Exercise Clause do not violate the Establishment Clause, then those truly compelled must not. When the exemption follows from the Free Exercise Clause, it not only serves a secular purpose, but one of the highest order. For the same reason, the "effect" of a decision advancing interests protected by the Free Exercise Clause can only be described as secular, because it would be carrying out the interests of a civilly constituted government.

The third concern of *Lemon* – entanglement of church and state – would appear to be addressed better by granting a religious exemption than by withholding it. One of the reasons why subsidies are of a constitutionally different magnitude than tax exemptions is the "comprehensive, discriminating and continuing state surveillance," *Lemon*, 403 U.S. at 61, necessary to monitor the expenditure of state funds in a religious environment, compared to the effect of an exemption, which is to "restrict the fiscal relationship between church and state" and to "complement and reinforce the desired separation between them." *Walz*, 397 U.S. at 676. Thus, the imposition of taxes on religious worship raises the specter of substantial entanglement between state and church, an Establishment Clause violation of greater magnitude than that created by an exemption.

A majority of the *Texas Monthly* Court would not, therefore, find that a properly drafted exemption that included religious literature necessarily offends the Establishment Clause. A decision recognizing that at least some religious literature must be exempt from sales and use taxes should, in fact, be interpreted so as to afford the protection to religious (and analogous – *see Texas Monthly*, 109 S. Ct. at 907 (Blackmun, J., concurring in the judgment)) organizations. In fact, a broadly drawn exemption would serve to avoid the entanglement of church and state that might well follow from scrutiny of each religion to determine the place literature distribution plays in its system of beliefs.

CONCLUSION

Therefore, and for all the foregoing reasons, the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

David M. Liberman
Counsel of Record
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 277-9288

Robert C. Moest
Barry A. Fisher
Fleishman, Fisher & Moest
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077

Attorneys for Amicus Curiae